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IN THE SUPERIOR COURT

STATE OF ARIZONA, COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	V1300CR201080049 **STATE'S REPLY TO DEFENDANT'S RESPONSE TO STATE'S MOTION FOR PROTECTIVE ORDER** **RE: STATE'S NOTES FROM INTERVIEWS** **(The Honorable Warren Darrow)**

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Comes now the State of Arizona, through undersigned counsel, and files this Reply to Defendant's Response to the State's Motion for Protective Order. Contrary to the accusations set forth in Defendant's Response, the State has and will continue to comply with its disclosure obligations set forth in Arizona Rule of Criminal Procedure 15.1 *et seq.*

MEMORANDUM OF POINTS AND AUTHORITIES

Introduction

Defendant's Response illustrates exactly why the State is requesting a protective order. Defendant asserts that the Court's September 20, 2010 Order was a "clear mandate" to the State of an ongoing obligation to disclose all notes by the prosecutors that memorialize any statement by a witness. Defendant writes that the State is re-litigating "the exact issue already decided by this Court" and that the State "flouts its discovery obligations." Defendant's October 18, 2010

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letter demanding "the State's notes memorializing Mr. Ross' statements" is clearly one of many such demands to come.[1]

To support his position, Defendant quotes from the Court's September 20 Order, but changes the Court's language in the Order by inserting "testifying experts" for the Court's original language ("medical examiners"). This position of the Defendant that they can continuously demand the prosecutor's notes is exactly the slippery slope the State warned the Court about during argument on Defendant's Motion to Compel.

In fact, the Court's September 20 Order pertained only to the State's notes summarizing oral communications of the medical examiners made during the December 14, 2009 pre-indictment meeting. The basis for the Court's September 20 decision was the Court's conclusion that the medical examiners had considered information presented in the December 14 meeting in reaching their medical conclusions, that the information was not otherwise available to Defendant, that the meeting was not recorded or otherwise documented, and therefore the PowerPoint and "any notes summarizing oral communications by the medical examiners," regardless of the author, had to be disclosed.

As explained below, the law provides access to the prosecutors' notes only in certain limited situations and does not stand for the broad principle asserted by Defendant.

The Law

Rule 15.1(b)(1), Ariz. R. Crim. P., requires the State to disclose the "names and addresses of all persons whom the prosecutor intends to call as witnesses in the case-in-chief together with

[1] In an October 18, 2010 letter, Truc Do wrote: "Furthermore, while you indicated that you have no report from Mr. Ross at this time, I am sure that the State is not calling Mr. Ross without first having had some conversation with Mr. Ross regarding his opinions, conclusions, and the scope of his proffered testimony. Pursuant to Ariz. R. Crim. P. 15.1(e)(3) and *State v. Reid,* 114 Ariz. 16, 30 (1976), Mr. Ray requests any and all statements made by Mr. Ross, including without limitations his own notes and the State's notes memorializing Mr. Ross' statements." Letter from Truc Do, Attorney for Defendant to Sheila Polk, County Attorney (Oct. 18, 2010) (Exhibit C to Defendant's Response).

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their relevant written or recorded statements." Rule 15.1(b)(4) requires the State to disclose the names and addresses of experts . . . "together with the results of physical examinations of scientific tests, experiments or comparisons that have been completed." In interpreting the discovery rules, Arizona courts have long noted that "[t]he criminal discovery rules do not require the state to provide a word-by word preview to defense counsel of the testimony of the state's witnesses." *See State v. Wallen,* 114 Ariz. 355, 364, 560 P.2d 1262, 1268 (App. 1977). Nor does the rule require, as Defendant would urge this Court to believe, the disclosure of every word stated by a witness that is written down by a prosecutor.

It is interesting to note that, although Defendant indicates the State is making "false accusations against the defense to deflect from its own discovery failures," Defendant fails to address the main point of the State's argument. If this Court's Order is to be interpreted as set forth in Defendant's motion, the notes of all parties, including those of Defendant's counsel and investigative staff, to the extent they contain any statements of any witnesses, in any context, should be immediately disclosed. "To be effective, the criminal discovery rule must be applied with equal force to both prosecution and defendant." *State v. Williams*, 121 Ariz. 218, 220, 589 P.2d 461, 463 (App. 1978) (citing *State v. Lawrence*, 112 Ariz. 20, 536 P.2d 1038 (1975)). The State does not believe this Court intended such a sweeping interpretation of its Order relating to the medical examiners' statements from the December 14, 2009 meeting.

Defendant mistakenly interprets the State's reference, in the Motion for Protective Order, to Defendant's disclosure of Dr. Paul and the lack of any disclosure relating to him or his anticipated testimony as an accusation of disclosure violations. The State has not accused Defendant of any disclosure violations but was simply illustrating the impact Defendant's interpretation of this Court's ruling would have on both parties in a criminal case. As noted in the

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State's Motion, Defendant has not provided the State with any notes from its files relating to Dr. Paul, even though the State is confident Defendant had some contact with Dr. Paul prior to deciding to retain him. The State is equally confident during the initial meetings with Dr. Paul he made some statements. To the extent Defendant's counsel has notes in its file relating to Dr. Paul, the State believes such notes are work product and are not required to be disclosed. Rather than demand that Defendant disclose such items, the State has appropriately requested notice of all materials reviewed by Dr. Paul, the disclosure of any report summarizing his findings and conclusions, and an interview with Dr. Paul once his review is complete.

In *Dean* v. *Superior Court*, 84 Ariz. 104, 324 P.2d 764 (1958), the Arizona Supreme Court considered the validity of a trial court's order requiring the "production of all memoranda in the possession, custody or control of the petitioner purporting to set forth the substance of any oral statements." *Id.* at 111-112, 324 P.2d at 769. In finding such a requirement "fraught with an inherently dangerous practice," the Court stated the following:

> We think such a requirement to produce a memoranda of the substance of an oral statement obtained from a prospective witness is fraught with an inherently dangerous practice which must by its very nature lead to inaccuracies, resulting in confusion and misinterpretation rather than to a presentment of the truth. The result would be the same whether the substance of oral statement were those of the attorney or another acting for him. A memoranda of the substance of oral statements should not be required under the Rule as we thoroughly agree with the analysis of the court in the Hickman case [329 U.S. 495, 67 S.Ct. 396].

Id.

The *Dean* decision further noted "if the witnesses themselves are available to the party and can be interrogated or examined by him, there will ordinarily be no occasion for ordering production of their statements." *Id.* at 113, 324 P.2d at 770. While the Court in *Dean* was addressing the production of statements in a civil context, the same rationale may be applied in the instant case. As noted in the State's Motion, Rule 15.1(a)(3), Ariz. R. Crim. P., is "designed

to give defendant an opportunity to check the validity of the conclusions of an expert witness and call such expert as his own witness or to have the evidence examined by his own independent expert witness." *State v. Roque*, 213 Ariz. 193, ¶ 32, 141 P.3d 368, 382 (2006). This purpose is served by the disclosure of the experts' reports once they complete their reviews, the disclosure of all materials reviewed by them and by providing Defendant the opportunity to interview them. This is the normal disclosure process in a criminal case and this is the process the Defendant is apparently following with his expert. There is nothing in this process that is further served by the disclosure of the personal notes of attorneys and staff for either party.

RESPECTFULLY submitted this 29th day of October, 2010.

Sheila S Polk

By_____

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COPIES of the foregoing emailed this this 29th day of October, 2010:

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By: Kathy Durrer

COPIES of the foregoing delivered this 29th day of October, 2010, to

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